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No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether an order remanding a case on other than "any equitable ground," which case had been removed pursuant to 28 U.S.C. § 1452, is reviewable by the court of appeals.

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28 U.S.C. § 1447 . . . . . *passim*

28 U.S.C. § 1452 . . . . . *passim*

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OPINIONS BELOW

The opinion and Order of the United States Court of Appeals for the Sixth Circuit is set forth as Appendix D in the Joint Appendix (J.A. 35a). That Order dismissed the appeal from the Order of the United States District Court for the Northern District of Ohio, set forth as Appendix C in the Joint Appendix (J.A. 18a). The Memorandum and Order of the United States Bankruptcy Court for the Northern District of Ohio are set forth as Appendices A and

B, respectively, in the Joint Appendix (J.A. 6a, 16a). None of the opinions below are reported in the official reports.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order dismissing Things Remembered, Inc.'s appeal to that court on November 15, 1994 and, on January 12, 1995, denied Petitioner's petition for rehearing with suggestion for rehearing en banc. Things Remembered, Inc. filed its petition for writ of certiorari on March 10, 1995. The petition was granted on May 1, 1995.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Primarily, this case concerns the meaning and application of 28 U.S.C. § 1452. A related issue involves a comparison of and contrast between the appealability bars in two statutory provisions, 28 U.S.C. § 1452(b) and 28 U.S.C. § 1447(d), and, more generally, the differences between the bankruptcy removal scheme in § 1452 and Fed. R. Bankr. P. 9027 and the general removal scheme in 28 U.S.C. §§ 1441, 1446-1447. Other statutes and rules, listed in the Table of Authorities, are relevant to that comparison and contrast.

The Appendix to this brief sets forth pertinent provisions of the following texts: 28 U.S.C. §§ 1334, 1441, 1446, 1447, 1452, and Fed. R. Bankr. P. 9027. Some of the key cases discussed in this brief are decided under

§ 1452's statutory predecessor, 28 U.S.C. § 1478. That superseded statute is set forth, in italic type, at A-9.

STATEMENT OF THE CASE

In March 1992 Anthony A. Petrarca ("Petrarca") sued Child World, Inc. ("Child World") and Cole National Corporation[1] in the Summit County, Ohio, Court of Common Pleas (the "State Court"). *Petrarca v. Child World, Inc., et al.*, Case No. CV 92 03 1069. Petrarca alleged that Child World had breached leases for certain real property in Denver, Colorado, and Wichita, Kansas, and that Things Remembered had breached its limited, conditional guaranty of Child World's obligations under the Denver lease. The damages alleged as against Things Remembered totaled approximately $2.8 million.

Child World filed, on May 6, 1992, a petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York. *In re Child World, Inc.*, Chapter 11 Case No. 92 B 20887 (HS). Pursuant to 11 U.S.C. § 365(a), that Bankruptcy Court authorized Child World's rejection of the Denver and Wichita leases that were the basis for Petrarca's State Court complaint.

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[1] Petitioner Things Remembered, Inc. is successor in interest by merger to Cole National Corporation. For ease of reference, and because any liabilities of Cole National Corporation in this litigation are those of Things Remembered, both will be referred to interchangeably in the Statement of the Case as "Things Remembered" and, in the Argument, as "Petitioner."

Pursuant to Supreme Court Rule 29.1, Things Remembered states that its corporate parent is Cole National Group, Inc., and that its only subsidiary is Cole Management Services, Inc.

On August 28, 1992, Petrarca filed an amended complaint in State Court which added ten new counts against Things Remembered only. In the new counts, Petrarca alleged new claims relating to different guaranties of different properties in Ft. Wayne, Indiana; Lancaster, Pennsylvania; Akron, Ohio; Westland, Michigan; and Peoria, Illinois. The amended complaint added new damage claims totaling approximately $12.3 million.

Less than 30 days later, on September 25, 1992, Things Remembered removed the claims in the amended complaint to the United States District and Bankruptcy Courts for the Northern District of Ohio.[2] Both removals were taken "pursuant to 28 U.S.C. § 1331, § 1334(b), § 1441, § 1446, § 1452, and Bankruptcy Rule 9027." The District Court consolidated the removed case filed in that court with the removed case filed in the Bankruptcy Court.

On competing motions (Petrarca's for remand and Things Remembered's for transfer of venue to the Child World "home" bankruptcy court in the Southern District of New York[3]) the Bankruptcy Court, relying on *In re Aztec*

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[2] As the District Court in this case observed in its Order on appeal from the Bankruptcy Court's ruling, there is "a fair amount of confusion among the courts concerning whether notices of removal taken pursuant to 28 U.S.C. § 1452 are properly filed with the bankruptcy court instead of the district court," and "Things Remembered's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty." (J.A. 20a n.1).

[3] The basis for Things Remembered's motion to transfer venue, and indeed for the removal itself, was that Petrarca's claims against Things Remembered "arose in" or were "related to" the Child World bankruptcy proceedings, *see* 28 U.S.C. § 1334(b), and hence were removable under authority of 28 U.S.C. § 1452. The jurisdictional nexus exists because (continued...)

Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987), ordered venue of the action transferred. (J.A. 8a, 14a-15a, 16a).

On Petrarca's appeal, the District Court reversed. That court held, *inter alia*, that Things Remembered's removal was untimely, whether measured by 28 U.S.C. § 1446(b) (as may be applicable to any general removal under 28 U.S.C. § 1441) or by Rule 9027 of the Federal Rules of Bankruptcy Procedure (as would be applicable to a removal under 28 U.S.C. § 1452). In either event, the District Court held, the time for removal arose on the day when Child World filed its Chapter 11 petition (or, alternatively as to the § 1441 aspect of the removal only, on a later date when Things Remembered filed its amended answer which made reference to the bankruptcy (J.A. 27a)) -- notwithstanding that by neither date had any of the new

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[3](...continued)
Things Remembered's guaranties were limited, by their express terms, to payment of Child World's "obligations" under its leases (whatever those obligations may be determined to be) not to performance or payment of the leases themselves. (For such a contractual limitation on a guaranty, *see, e.g., Western-Bank Downtown v. Carline*, 757 S.W.2d 111, 113 (Tex. App.-Houston [1st Dist] 1988)). Thus, notwithstanding 11 U.S.C. § 524(e), the question of the extent to which Petrarca could recover from Things Remembered upon the guaranties is a question that is controlled by Child World's "obligations" under the leases, as such "obligations" will be determined in the Bankruptcy Court after application of the limitation on lease rejection damages provided by 11 U.S.C. § 502(b)(6). Neither court below (Bankruptcy or District) has passed upon the existence of such a § 1334 jurisdictional nexus. The remand at issue herein was solely based upon a perceived procedural defect (timeliness) in removal.

claims added by Petrarca's amended complaint even been asserted.[4] Accordingly, the District Court held the removal to be procedurally improper, and reversed the Order of transfer and remanded the case to the Bankruptcy Court for further proceedings. (J.A. 18a, 31a-32a).

Things Remembered timely appealed this procedural remand in order to assert and protect its right to a federal forum, *see* note 3, *supra*. The Sixth Circuit, finding that, "[a]s a general rule, an order remanding an action to a state court from which is [*sic*] was removed is not reviewable on appeal or otherwise," (J.A. 35a-36a), ordered Things Remembered to show cause why the appeal should not be dismissed. After that show cause Order was briefed, the Sixth Circuit dismissed the appeal.[5]

The Sixth Circuit cited two reasons for that dismissal: (1) that the District Court's ruling on the § 1441 removal to the district court (i.e., that it was untimely) was not appealable by virtue of 28 U.S.C. § 1447(d); and (2) that the District Court's ruling on the bankruptcy removal

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[4] In fact, the new claims were not asserted until three and a half months after the bankruptcy filing. In short, the District Court Order -- which found that the time for removal expired at the latest 90 days after the May 6, 1992 bankruptcy filing -- would require Things Remembered to remove claims before they were asserted. This is not and cannot be, Things Remembered submits, the law -- and that is the basis upon which Things Remembered appealed to the Sixth Circuit.

[5] The Sixth Circuit's Order to Show Cause directed the parties to brief only the issue of appealability, not the substantive issue upon which the appeal was taken. Accordingly, the Sixth Circuit did not consider Things Remembered's argument that the District Court had miscalculated the removal period and that, moreover, the result would, in some circumstances, allow a plaintiff to manipulate its pleading to completely foreclose a defendant's right to remove.

pursuant to 28 U.S.C. § 1452(b) (i.e., that it too was untimely) was likewise not appealable, on authority of three cases from the courts of appeals and one from this Court. (J.A. 36a). The Sixth Circuit did not address the contrary authority, or the distinction in 28 U.S.C. § 1452(b) between equitable and other remand orders.

Things Remembered's petition for writ of certiorari, filed on March 16, 1995, was granted on May 1, 1995. 115 S. Ct. 1821.

SUMMARY OF THE ARGUMENT

This case involves a federal appellate court's refusal to review a judgment of an inferior court where there is no prohibition of such review. The dismissal of Petitioner's appeal by the Sixth Circuit was erroneous because a claim or cause of action removed under 28 U.S.C. § 1452, then remanded on other than "any equitable ground," is appealable pursuant to 28 U.S.C. § 158(d). The issue presented in this case has been directly addressed by the circuit courts, which have split on precisely opposite sides of the question.

The merits of the District Court's remand Order are not before this Court, and so are discussed only when appropriate to an understanding of context, in footnotes in this brief. The only aspect of that Order which *is* directly relevant here is that it was *not* based "on any equitable ground."

Section I of this brief shows that appeal of the Order is not barred by § 1452(b), which precludes review only of remands made on "any equitable ground." Nor, as Section II of this brief demonstrates, is appeal barred by § 1447(d),

which precludes review only of remands premised on a lack of subject matter jurisdiction in a case in which the removal was effected pursuant to 28 U.S.C. § 1441.

For the reasons stated herein, the Sixth Circuit's Order should be reversed, and this case remanded to that court for consideration of the merits.

ARGUMENT

I.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1452(b)

As its title indicates, 28 U.S.C. § 1452 specifically governs "Removal of claims related to bankruptcy cases." Subsection (a) authorizes removal of causes of action and claims if there is jurisdiction under 28 U.S.C. § 1334. Subsection (b) governs remand of those causes of action or claims:

> The court to which such claim or cause of action is removed may remand such claim or cause of action *on any equitable ground*. An order entered *under this subsection* remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals . . .

(emphasis added). By its plain terms, subsection (b) bars appeal only of remands made on *equitable* grounds, and carves out, as not within its comprehension, remands on other than equitable grounds.

The remand Order below was not based "on any equitable ground"; indeed, no such ground was before the District Court. The Bankruptcy Court, following *In re Aztec Industries, Inc.*, 84 B.R. 464 (Bankr. N.D. Ohio 1987), explicitly declined to consider any issues other than timeliness of the removal: "Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court." (J.A. 8a). Thus, both the Bankruptcy Court Order and the District Court remand concerned the purely procedural matter of timeliness, and there was no consideration given to "equitable" analysis. This was also explicitly recognized by the District Court, which stated that the objections on appeal from the Bankruptcy Court Order "concern conclusions of law reached by the bankruptcy court," thus making the District Court's review *de novo* (J.A. 21a). As the District Court concluded:

> Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.

(J.A. 31a).

A. The Plain Language of § 1452 Should Be Given Effect to Allow Appeal of Remands Entered on Other Than "Any Equitable Ground"

Thus, by the plain language of § 1452(b), appeal of the District Court's Order is not barred. This was the precise holding of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d

Cir. 1984).[6] *Pacor* held that "[s]ection 1478(a) [the predecessor of § 1452(a)] authorizes a very different type of removal than does section 1441," 743 F.2d at 991, and that the general removal provisions could not and should not be applied to bankruptcy removals. 743 F.2d at 991-92. It then read the reviewability bar of § 1478(b) by its plain language: i.e., that only remands on *equitable* grounds were not reviewable.

Since the *Pacor* district court had held that the original suit was not "related to" a bankruptcy proceeding, and thus that it lacked jurisdiction under the predecessor to 28 U.S.C. § 1334(b) such that the case would be remanded on that jurisdictional ground, the Third Circuit found no bar to appeal of the district court's jurisdictional remand. *Accord*, *In re National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986) (adopting the reasoning of *Pacor* and *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984)); *see also National City Bank v. Coopers & Lybrand*, 802 F.2d 990 (8th Cir. 1986) (declining to hear appeal of remand order based on lack of federal question jurisdiction under § 1331, but accepting appellate jurisdiction over jurisdictional remand of bankruptcy removal to evaluate "related to" nexus).

In declining to accept appellate jurisdiction over this procedural remand, the Sixth Circuit relied in part on three circuit court cases, each of which, explicitly or implicitly, rewrites the statute in a way that standard canons of

[6] This Court recently examined *Pacor* in some detail, and approved its analysis as to another aspect of that case -- the scope of "related to" jurisdiction under 28 U.S.C. § 1334. *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995).

statutory construction, and this Court's decisions, will not permit.[7]

One of those, *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991) holds, for example, that whatever the penultimate word in the first sentence of § 1452(b) may mean, it does not mean "equitable." This is so, that court held, because the "distinction between law and equity was abolished long ago." Accordingly, "'[e]quitable' in § 1452(b) makes more sense if it means 'appropriate.'" 942 F.2d at 1226. That this reading made "more sense" was based on several policy considerations, including that, in the court's view, "remands on procedural and jurisdictional grounds are largely mechanical, and 'equitable' remands are discretionary so that appellate review would be deferential." For these reasons, the court said, "the costs of delay are not worth bearing." 942 F.2d 1226. The court did not cite any legislative history, or other evidence that Congress agreed with its cost-balancing, for this conclusion.

Sykes v. Texas Air Corp., 834 F.2d 488 (5th Cir. 1987) also squarely considered, and rejected, the statutory language. Like *Hernandez*, *Sykes* recognized the absence of a bar to appeal of other than equitable remands in § 1452 but declined to give it effect, calling it "a sort of semantic crack in the statute." 834 F.2d at 490. That crack the *Sykes* court undertook to patch itself by application of its "sound

[7] Those three cases rely on two analytical justifications: first, that the statute cannot, for whatever reason, mean what its plain language says (or, that words that do not appear in the statute should be read into it), and second, that 28 U.S.C. § 1447(d) independently bars appeal. The first of these justifications is addressed here in Section I of this brief and the second in Section II.

appreciation of the strong congressional policy against review of remand orders." 834 F.2d at 490.

The third case cited by the Sixth Circuit was its own *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056 (6th Cir. 1986). *Boone Coal* rejected *Pacor*, instead finding a line of pre-*Sykes* Fifth Circuit cases more persuasive, including, primarily, *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984).

Boone Coal, however, greatly (and incorrectly) overstated *Browning*'s import. *Browning* was indeed germane authority for the limited proposition that equitable remands are not reviewable. But *Browning* also recognized and indeed *endorsed* the distinction between reviewability of remands on equitable grounds and reviewability of remands on other grounds, which had been drawn by the Third Circuit in *Pacor*:

> Nonreviewability extends only to the discretionary decision to remand or not to remand a properly removed action, not to whether the bankruptcy court originally had jurisdiction over the matter. . . . There is no dispute in the instant case that the Bankruptcy Court had jurisdiction to act and the manner in which it acted is not subject to our review. In *Pacor* . . . the Third Circuit held that, § 1478(b) notwithstanding, it could review a remand order when the bankruptcy court [believed that it] lacked jurisdiction under § 1471(b) [now § 1334] because the removed proceeding was not "related to" bankruptcy. In contrast, the instant action involves a decision by the Bankruptcy Court,

> having jurisdiction and in the exercise of its discretion, to remand the 1979 case.

Browning, 743 F.2d at 1076-77 n.21.[8] Thus *Browning* approved the *Pacor* distinction (which was simply ignored by the court in *Boone Coal*) and properly determined only that it could not review an order of remand based on equitable considerations -- not the type of remand at issue here.

B. The Legislative Intent of § 1452 Is To Permit Appeal of Remands Entered on Other Than "Any Equitable Ground"

The *Hernandez* and *Sykes* interpretations are contrary to standard canons of statutory construction. If a statute has a "semantic crack," it may be the job of Congress to patch

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[8] The Fifth Circuit's cases on this issue have not evolved in a straight line. The first, *In re Compton*, 711 F.2d 626 (5th Cir. 1983), was a two-paragraph *per curiam* opinion in which "no litigant made and no judge considered the fancy argument advanced in this case," *Sykes*, 834 F.2d at 492. *In re Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986) followed *Compton* with little or no more analysis. *Browning* then took pains, in its footnote 21 analysis, to point out the explicit distinction between equitable and other remands in the statute, which distinction had been ignored in *Compton* and *Rayburn*.

For those pains, the *Browning* court was chastised by two judges of the later, *Sykes* panel, for "overrul[ing]" *Compton* -- notwithstanding that *Compton* never considered the argument because it was never made. *Sykes*, 834 F.2d at 492; *see also* 834 F.2d at 493 (Rubin, J., concurring: "I do not fully agree with the rationale" of Part C of *Sykes* (i.e., that part which discussed *Pacor, Compton, Rayburn,* and *Browning*)).

In any event, *Sykes* is apparently controlling in the Fifth Circuit -- or perhaps not, *see* note 9, *infra*.

it, but the job of the courts is to apply the statute as written, crack or no:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992).[9] Moreover, the *absence* of statutory language is as telling as its presence; the plain meaning of a statute can be ascertained also from what is plainly *not* in it. *Casus omissus pro omisso habendus est.*

Thus, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 825 (1990), this Court declined to infer that federal court jurisdiction was exclusive over claims under Title VII of the Civil Rights Act of 1964 because there was no such limitation in the statute:

> Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision

[9] Indeed, *Germain* "in all likelihood overrules" *Sykes, Compton,* and *Rayburn*, in the opinion of one bankruptcy court within the Fifth Circuit. *In re Biglari Import & Export, Inc.*, 142 B.R. 777, 783 n.11 (Bankr. W.D. Tex. 1992).

> is strong, and arguably sufficient, evidence that Congress had no such intent.

494 U.S. at 823 (footnote omitted). The analogy to this case is apt: both cases concern whether a limitation on jurisdiction can be read into a statute that is silent as to the limitation, and both cases present a contrast with other statutes that *do* contain the limitation.

Yellow Freight reached its conclusion even in the face of legislative history arguably impelling a contrary reading of congressional intent. 494 U.S. at 824-25. *A fortiori* that conclusion would be appropriate where the legislative history cannot be so read.

As the Fifth Circuit observed in *Browning*, the legislative history of § 1478 "offers no insight into its intended scope," 743 F.2d at 1076, and the same is true as to § 1452. This is, then, a situation like that addressed in *Toibb v. Radloff*, 501 U.S. 157 (1991): "[T]he scant history on this precise issue does not suggest a 'clearly expressed legislative inten[t] . . . contrary . . . ' to the plain language." 501 U.S. at 162 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Given that circumstance, here as in *Toibb*, the plain language should be applied. *See also Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (where the language of the statute is unambiguous, "silence in the legislative history cannot be controlling").

Section II of this brief shows that the statutory distinction in § 1452 is sound and sensible. But the speculations of lawyers -- or of courts -- as to whether there are good policy reasons to bar appeal only of equitable remands, and not of other-than-equitable remands, should in

no event prevail over the plain language of the statute. "Whether Congress has wisely balanced the sometimes conflicting policies underlying [a statute] is not a question that [the courts are] authorized to decide." *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991).

Thus, a court should not disregard the plain language of a statute because of, e.g., its view that "[a]ppellate review of remand orders . . . is necessarily inefficient," *Sykes*, 834 F.2d at 491, or by postulating each and every result of that language which the court deems unwanted. *Hernandez*, 942 F.2d at 1225. "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Toibb v. Radloff*, 501 U.S. 157, 164 (1991), *quoted in Union Bank*, 502 U.S. at 158. As this Court stated in another, more dramatic context,

> The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may if it sees fit amend the law.

Caminetti v. United States, 242 U.S. 470, 490-91 (1917).

Nor is it correct to presume, as the *Hernandez* court did, 942 F.2d at 1226, that Congress could not have meant "equitable" because there is no longer a law/equity distinction.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952); *United States v. Shabani*, 115 S. Ct. 382, 384 (1994) (it is a settled principle of statutory construction that Congress intends, absent contrary indications, to adopt the common law definition of statutory terms).[10]

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[10] And interpreting "equitable" to mean something else (like "appropriate") because the law/equity distinction has been abolished might have other unforeseen implications and do other mischief as well, given the use of the term in other sections of the United States Code. *E.g.*, 11 U.S.C. § 510(c)(1) (court may subordinate all or part of an allowed claim, etc. "under principles of equitable subordination"). Moreover, the Bankruptcy Court is a court of equity, deriving broad powers from 11 U.S.C. § 105. *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 (1995); *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549, 551 (1990). Finally, when Congress wants to use the word "appropriate," it does so -- including in the Bankruptcy Code. Indeed, *Energy Resources* considered two provisions of Title 11 containing the word, 495 U.S. at 549, and held, on grounds pertinent to the issue here, that the absence of a explicit statutory limitation (in that case, on certain powers of the bankruptcy court) was persuasive evidence that no such limitation was intended.

Finally, to construe *this* statute -- either by ignoring its plain language or (as will now be discussed) by wrongly invoking the general removal statute -- to bar appeal of other-than equitable remands should be especially forbidden: it is a "well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by 'clear and convincing evidence,'" *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 914 (2d Cir. 1976) (quoting *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)). There is no such "clear and convincing evidence" to support the ruling here.

In short, it may well be possible to construct an argument that "appropriate" is a more sensible word than "equitable" in the context of § 1452(b), *Hernandez*, 942 F.2d at 1226 -- but Congress did not use the word "appropriate." It used the word "equitable," which (1) does not mean "untimely under the removal rules," (2) is not absurd in the context, and (3) thus should be applied.

II.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1447(d)

The second basis upon which the courts of appeals have analyzed whether procedural or jurisdictional remands of § 1452 removals are reviewable is by consideration of the applicability of 28 U.S.C. § 1447(d) to such remands and removals.[11]

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[11] The fact that § 1441 was cited in Things Remembered's notices of removal as among the statutory bases for removal does not mandate the (continued...)

A. The "General" Removal Scheme and the Bankruptcy Removal Scheme Cannot Be Engrafted Onto Each Other

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), held that the "general" removal scheme of 28 U.S.C. §§ 1441-1447 is inapplicable to removals effected pursuant to the specific and self-contained bankruptcy removal scheme of 28 U.S.C. § 1478 (now 28 U.S.C. § 1452 and Fed. R. Bankr. P. 9027). Congress could not have intended that the general bar of § 1447 apply to bankruptcy removals under § 1452, the court held, because such an application would create "incongruous results" and "needless conflict and inconsistencies." *Pacor*, 743 F.2d at 992.[12]

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[11](...continued)
application of the provisions of § 1447 or preclude Things Remembered from arguing that it is not applicable to this § 1452 removal. Things Remembered's invocation of federal question jurisdiction through 28 U.S.C. § 1331, and removal through § 1441, was, as recognized by the District Court below, a proper "act of caution," *see* note 2, *supra*, though ultimately unnecessarily duplicative of the precise source of jurisdiction (§ 1334) and of removal (§ 1452). This case can and should be considered, therefore, as one in which the District Court remanded only a § 1452 removal on an other-than-equitable ground.

[12] The *Pacor* holding was addressed by the Third Circuit in *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838, 39 n.4 (3d Cir. 1991), *cert. denied sub nom. General Pub. Utils. Corp.*, 503 U.S. 906 (1992). Although *TMI Litigation* has been characterized as the Third Circuit's "second thoughts" on *Pacor*, *see Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991), the cited passage of *TMI Litigation* in fact remains faithful to *Pacor*; it leaves *Pacor* undisturbed while recognizing that *United States v. Rice*, 327 U.S. 742 (1946) may prohibit review of remand orders when a removal is effected pursuant to a statute which *could* bear the overlay of the general removal scheme. *See infra*, at 28.

These inconsistencies between the two removal schemes are apparent: there are differing time limits for filing notices of removal; there are differing fora from which removal may be effected; and there are differing parties who can effect removal. In short, "an inexplicable hiatus would develop if the two [schemes] were engrafted onto each other, whereby some removed bankruptcy cases would be covered by the procedures of sections 1441-1447, while others would not." 743 F.2d at 992.

As an example, consider the situation of a § 1452 removal of an arguably "related to" single cause of action taken by a plaintiff from a proceeding pending in a non-state forum court within 90 days of an order for relief under the Bankruptcy Code.[13] Such a removal would be timely pursuant to Fed. R. Bankr. P. 9027, would be arguably substantively proper under the federal court's "related to" jurisdiction of § 1334, and would be taken from an appropriate forum by an appropriate party under § 1452. Suppose then that the Bankruptcy Court, being of the opinion that the "related to" jurisdictional nexus did not exist, issued an order of remand, which was affirmed on appeal to the District Court. If the removing party appeals this jurisdictional ruling to the Court of Appeals, how, then, would the removal scheme, and particularly the appealability bar, of §§ 1441-1447 be applied?

To begin with, § 1441 speaks of removal of "civil actions" by "defendants," which did not occur. Section 1446 permits a "defendant" to file a notice of removal in a time period measured by the defendant's receipt of an initial

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[13] As an example of a plaintiff's timely removal from a non-state forum court under § 1452, *see In re Adams*, 133 B.R. 191 (Bankr. W.D. Mich. 1991) (removal from a Tribal Court).

pleading setting forth the basis for removal, which likewise did not occur. Section 1447 requires the remand of a "case" when subject matter jurisdiction appears lacking, and further provides that an order remanding that case to the state court from which it was removed is not reviewable. In the posited hypothetical, no "case" would have been remanded, and the cause of action which was remanded would not have been returned to a state court. Section 1447, including its bar to reviewability, would not be applicable to this hypothetical removal.

It seems clear, therefore, that not all § 1452 removals and remands could be governed by the removal/remand scheme of §§ 1441-1447. That being so, should *some* § 1452 removals and remands -- those that may be fitted into the more general scheme -- be governed by it?

The cases which disregard or discount the incongruities identified in *Pacor* import into the § 1452 removal scheme the idea that § 1447(d) bars appeal of all other remand orders, so that, combined, the two statutes "cover the waterfront," and so create an absolute bar to appeal. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991). Thus, in addition to its assessment that the appealability bar of § 1452(b) should itself be construed broadly enough to encompass remands made for any reason, the *Hernandez* court opined that § 1447(d) is applicable to remands of removals effected pursuant to § 1452. This is said to result from the observation that:

> § 1452 relies on other provisions in Chapter 89 [of Title 28], which specify the time and procedure for removal. All § 1452(a) does is describe a class of removable cases; it does not say or imply, for example, that

> removal may occur without the signed petition required by § 1446(a) or after the time specified by § 1446(b).

942 F.2d at 1225. This observation is inaccurate, because removals of the class of cases described by § 1452(a) are governed *not* by § 1446, but by Fed. R. Bankr. P. 9027. There are substantial differences between § 1446 and Rule 9027, particularly with regard to time periods for removal, so that in fact § 1452(a) *does* imply that the §§ 1441-1447 scheme is inapplicable.[14]

The *Hernandez* court was also of the belief that, without any statutory authority to remand § 1452 cases removed without jurisdiction, a removed case would need to be dismissed outright, and would then be refiled, removed, and dismissed, on a sort of procedural yo-yo that would insulate a defendant from legal process. 942 F.2d at 1225. But *Carnegie-Mellon University v. Cohill*, 484 U.S. 341 (1988), establishes that a district court may remand, rather than dismiss outright, claims over which it would not originally have jurisdiction, so that a removal defendant could not use this *Hernandez* tactic of insulation from process.[15]

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[14] For example, a potentially removable claim first served on a defendant on the day before a bankruptcy case is commenced could be subject to Rule 9027(a)(2)(A), allowing ninety days after the order for relief to remove; or, according to *Hernandez*, it could be subject to § 1446, allowing only thirty days. This situation, again, demonstrates the incongruity between the removal schemes identified in *Pacor* and, again, offers a reason why the schemes cannot be said to overlap.

[15] Moreover, a § 1452 removal must be "signed pursuant to Rule 9011," *see* Fed. R. Bankr. P. 9027. Given this requirement, it would seem less (continued...)

In *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), the Fifth Circuit took a slightly different policy tack. That court held, in a portion of its opinion joined by two judges, that although "the carefully reasoned opinion" of *Pacor* was "a plausible way to avoid inconsistencies that could result from the simultaneous application of the two removal [schemes]," 834 F.2d. at 491, *Pacor* was nevertheless flawed because it straightforwardly applied the statutory language without regard to what the *Sykes* court determined to be the underlying (if unarticulated) congressional policy. The *Sykes* court believed that *Pacor*'s reading of the separate congressional enactments gave "incentives for the district court to engage in strategic maneuvering" with respect to the scope of appeal. 834 F.2d at 492. Deeming such "incentives" unwise (without addressing their plausibility), and deeming there to be one too many already in § 1447(d) as a result of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Fifth Circuit dismissed the idea that Congress intended to permit review of § 1452 jurisdictional remands but not § 1447 jurisdictional remands.

But this Court has already determined that separate congressional enactments can operate one upon the other such that the more specific prevails over the more general. In *Federal Election Commission v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994), this Court considered whether two statutes -- one granting the Federal Election Commission ("FEC") the authority to "appeal" actions under the Federal Election Campaign Act ("FECA") *and*

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[15](...continued)
than likely that a removing party would return to a court that had told that party, a relative moment before, that the original removal was improper.

under Title 26 of the United States Code, and one granting the FEC the authority to "petition the Supreme Court for certiorari" in actions under Title 26 only -- could be read to grant to the FEC the authority to petition for certiorari in FECA actions. Finding that authority to "appeal" *would* ordinarily include authority to petition for certiorari, the Court nevertheless held that the more specific statute must control:

> It is difficult, if not impossible, to place these sections alongside one another without concluding that Congress intended to restrict the FEC's independent litigating authority in this Court to actions enforcing Title 26 [only].

115 S. Ct. at 541. Likewise in this case, the specific scheme of § 1452 and Rule 9027 covers bankruptcy removals to the exclusion of the more general scheme of §§ 1441-1447. Here, too, it "is difficult, if not impossible, to place these [schemes] alongside one another without concluding that Congress intended to restrict" appeals only of equitable, and not other remands in removals effected under § 1452.

There are, furthermore, valid policy reasons why Congress may have intended to allow jurisdictional review under § 1452, but not under § 1447. The bankruptcy jurisdiction of the federal courts extends to all civil proceedings arising under, arising in, or related to cases under Title 11 of the United States Code. 28 U.S.C. § 1334. "Congress did not delineate the scope of 'related to' jurisdiction . . .," *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), choosing instead to leave to the courts the task of defining its breadth. That undefined jurisdictional

scope stands in stark contrast to the exactitude with which other grants of jurisdiction may be determined upon removal under § 1441: parties are or are not diverse, and a sum in controversy does or does not exceed a statutory minimum; a well-pleaded complaint does or does not invoke a federal question. Cases removed in the absence of these factually verifiable bases of jurisdiction, and therefore remanded, do not, in the judgment of Congress, require appellate review of those facts (or the absence thereof).

But the federal courts' "related to" jurisdiction is far more uncertain and unverifiable: it concerns an analysis of whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Celotex*, 115 S. Ct. at 1499 n.6, (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Particularly in light of the restrictions imposed on the functions of bankruptcy administration by *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress may very well have chosen -- by remaining silent in § 1452 and declining to amend § 1447 -- to permit appellate courts to define the scope of "related to" jurisdiction.

B. *Thermtron* and *United States v. Rice* Support Petitioner's Reading of the Relationship Between § 1447 and § 1452

An examination of 28 U.S.C. § 1447 itself, as it has been interpreted by this Court, also leads to the conclusion that it does not, and was not intended to, govern removals effected under § 1452. Section 1447(d) is part of a section of Title 28 encompassing §§ 1441-1447 captioned "Actions Removable Generally" and "Procedures After Removal Generally." Subsection (d) provides, in pertinent part, that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise [with an exception not relevant here].

Broad as this language may be, its bar to reviewability is not all-encompassing. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court held that only those orders remanding cases for a reason specified in subsection (c) of the statute would be subject to the review bar of subsection (d). *Thermtron* thus limited the potential reach of subsection (d) by requiring that it be read *in pari materia* with subsection (c).

By doing so, *Thermtron* also requires that the review bar of subsection (d) apply to only those cases removed by notice of removal under 28 U.S.C. § 1446(a) -- that is so because a § 1446(a) notice of removal is the only type of removal referred to in § 1447(c) (which must be read *in pari materia* with § 1447(d)). In other words, the language of § 1447(d), read *in pari materia* with § 1447(c) (as compelled by *Thermtron*), reads as follows:

> An order remanding a case [for lack of subject matter jurisdiction] to the State court from which it was removed [by filing of a notice of removal pursuant to § 1446(a)] is not reviewable on appeal or otherwise.

Therefore, a § 1452 removal, effected by a notice of removal filed in accordance with and under the time limits of Rule 9027, is not covered under and should not be

"imported" into § 1447(d), and § 1447(d) is hence inapplicable to bankruptcy removals.[16]

Even if one portion of § 1447(c) (that specifying the § 1446(a) notice of removal) were not *in pari materia* with § 1447(d), while another portion of § 1447(c) -- (that specifying the unreviewable remand must be on jurisdictional grounds) was *in pari materia*, a § 1452 jurisdictional remand would yet not necessarily be subject to the review bar of § 1447(d). Although this Court had, prior to *Thermtron*, applied the § 1447(d) review bar to a removal and remand effected under statutory authority other than § 1441 (that is, by a notice of removal other than the one defined in § 1446(a)) that decision is distinguishable from the circumstances of the instant case.

The most commonly cited source (including in the Sixth Circuit's Order below) for the broad, cross-statutory reach of § 1447(d) is *United States v. Rice*, 327 U.S. 742 (1946).[17] In *Rice*, the district court remanded, on juris

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[16] If *Thermtron* had held that § 1447(d) "means what it says," without the exception read in by the *Thermtron* majority, *see* 423 U.S. at 354 (Rehnquist, J., dissenting), there would be very simple grounds on which to reverse the decision of the Sixth Circuit below. If § 1447(d) barred all review of any remand order entered on any ground, that all encompassing prohibition would render § 1452(b)'s limited appeal bar superfluous, and thus would create a "positive repugnancy" between the separate appellate bars of §§ 1447(d) and 1452(b). *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). *Germain* holds that where a positive repugnancy exists, such as to render one statute superfluous, the more specific congressional pronouncement (in this case § 1452) is to be given effect, and the more general (in this case § 1447) is not applicable.

[17] *Rice* has been legislatively overruled. *See* Act of Aug. 4, 1947, ch. 458, 3(c), 61 Stat. 732 (referenced in the notes following 25 U.S.C.

(continued...)

dictional grounds, a case removed pursuant to the Act of 1926, which permitted the United States to remove certain suits "in the State Courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma [is a party]." 327 U.S. at 744-45. Upon the United States' application to the Tenth Circuit for writ of mandamus, that court certified to this Court the question of whether such a remand was reviewable.

This Court first noted that (unlike § 1452) the Act of 1926 itself contained "no provisions respecting remand or any mode of review of an order of remand." 327 U.S. at 748. In the absence of such provision, this Court held, the Act of 1926 had to be read in conjunction with the general removal/remand scheme, first appearing in § 2 of the Judiciary Act of 1887 (and now appearing in 28 U.S.C. §§ 1441-1447), and that review of the remand was therefore barred.

Rice is distinguishable from the instant case, first, because "[n]othing in the Act of 1926 purport[ed] to impair or restrict the application of" the general removal bar. In § 1452, by contrast, Congress has set forth a remand/removal scheme which prohibits review of some, but not all, remand orders. Second, the application of the general removal/remand scheme to the Act of 1926 could create no incongruities or statutory gaps because the only forum from which removal could be effected under that Act -- the State Courts of Oklahoma - was included in the fora (any state court) to which the general scheme applied.

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[17](...continued)
§ 355) (granting the United States the right to appeal remand orders entered in cases involving property of Indians of the Five Civilized Tribes in Oklahoma).

Again in contrast, § 1452 does contemplate removals from non-state court fora -- which are *not* addressed in § 1447.

The issue before this Court involves whether removals and remands effected pursuant to § 1452 are subject to the appealability bar of § 1447(d) as interpreted in *Thermtron*. *Rice* shows that that general bar could perhaps be applied to removal statutes which can comfortably bear its overlay. Neither *Thermtron*, nor *Rice*, nor any other precedent to date, however, has explained or can explain the application of § 1447(d)'s narrow reviewability bar to a statute that (1) contains its own provisions for removal and remand, (2) contains its own reviewability bar (for equitable remands only), and (3) concerns a jurisdictional grant ("related to") of uncertain definition. Section 1452 is such a statute; it cannot, and does not accommodate § 1447.

CONCLUSION

The Sixth Circuit erred in dismissing this appeal, because there is no statutory bar to review of the District Court's Order. For the reasons set forth in this brief, Petitioner requests that this Court reverse the Sixth Circuit's Order, and remand this case to that court for consideration of the merits.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1334. Bankruptcy cases and proceedings*

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such

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* Section 1334 was amended October 22, 1994. Pub. L. No. 103-394, § 104(b), 1008 Stat. 4109 (1994). However, the amendments apply only to actions commenced under Title 11 on or after October 22, 1994, Pub. L. No. 103-294, § 702, 108 Stat. 4109 (1994), and so are not included here.

proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * * *

28 U.S.C. § 1446. Procedure for removal*

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction

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* Section 1446 was amended December 8, 1994. Pub. L. No. 103-465, § 321(b), 108 Stat. 4946 (1994). The changes effected by these amendments are not pertinent to the issues presented here and so are omitted.

conferred by section 1332 of this title more than 1 year after commencement of the action.

* * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * * *

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1478. Removal to the bankruptcy courts.

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

Fed. R. Bankr. P. 9027. Removal

(a) Notice of removal

(1) *Where Filed; Form and Content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core, and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) *Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code.* If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the ~~claim or~~ cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) *Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code.* If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the

initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Notice Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) Filing in non-bankruptcy court Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) Remand A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) Procedure After Removal

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district,

the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(f) **Process after removal** If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) **Applicability of Part VII** The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the

other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

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